



Scottish Information
Commissioner
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Decision Notice 239/2025

Whisky storage planning application for a specified location

Authority: Aberdeenshire Council
Case Ref: 202401534

Summary

The Applicants asked the Authority for information relating to a planning application for a whisky storage site. The Authority provided some information and withheld other information because it considered that it related to internal communications or was confidential. The Commissioner investigated and required the Authority to issue the Applicants with a revised review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant”, “the Commissioner” and “environmental information”) (Interpretation); 5(1) and (2) (Duty to make environmental information available on request); 8(1) (Charging); 10(4)(e) (Internal communications); 11(2) (Personal data); 13(a) and (b) (Refusal to make information available); 17(1), (2)(a) and (b) (Enforcement and appeal provisions).

Background

1. On 18 June 2024, the Applicants made a request for information to the Authority. They asked for all information not already available about a planning application relating to the change of use of agricultural buildings to a long-term whisky storage facility and associated development under the EIRs. The full text of the request is replicated in Appendix 1.

2. The Authority responded on 12 July 2024 with a fees notice for £114.75 under regulation 8(1) of the EIRs.
3. On 23 July 2024, the Applicants asked the Authority to revisit the cost on the basis of reviewing/accessing material associated with the site for the last year. They stated that most of the information should be held in the planning file and should also be publicly available in any case. They submitted a follow-up email on 12 August 2024 asking for an update.
4. The Authority responded on 12 August 2024 in relation to the fees notice. It informed the Applicants that although they had refined their request, the fee remained the same because the information was already within the “last year” timeframe and stated that full payment was due in advance.
5. On 15 August 2024, the Applicants emailed the Authority to inform it that they had made several attempts over two days to pay the fee notice on the telephone number provided for that purpose, but that no-one appeared to be available to answer. The Applicants requested that someone contact them so that they could pay and access the requested information.
6. The Authority responded to the information request on 28 August 2024. It disclosed some information to the Applicants and informed them this information was also available online via a website, to which it provided a link. The Authority also withheld information under regulations 10(4)(e) (Internal communications), 10(5)(d) (Confidentiality of proceedings) and 10(5)(e) (Confidential commercial or industrial information) of the EIRs, and it notified the Applicants that it would refund £104.33 of the fee.
7. On 8 September 2024, the Applicants wrote to the Authority requesting a review of its decision. The Applicants stated that they were dissatisfied with the decision because:
 - (i) the fee had varied substantially, and they sought an explanation;
 - (ii) the original request had been made on 18 June 2024 not 23 July 2024, as referenced by the Authority in its response, and the delay in responding to the request had been prejudicial to them (the Applicants); and
 - (iii) exceptions had been used to restrict access to information in a situation where there was significant concern with the Authority’s handling of the planning application.
8. The Authority notified the Applicants of the outcome of its review on 3 October 2024 and upheld its original response without modification.
9. On 22 November 2024, the Applicants wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicants stated they were dissatisfied with the outcome of the Authority’s review because exceptions had been used to restrict access to documentation and there was significant concern about (and clear public interest in) how the Authority had handled the planning application. The Applicants also expressed dissatisfaction about fees and timescales and they argued that redactions could have been applied to specific sensitive information while disclosing the remainder.

Investigation

10. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
11. On 17 December 2024, the Authority was notified in writing that the Applicants had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicants. The Authority provided the information and the case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to searches carried out, the application of the exceptions and the fee applied.

Commissioner's analysis and findings

13. The Commissioner has considered all of the submissions made to him by the Applicants and the Authority.

Handling in terms of the EIRs

14. The Authority handled the request under the EIRs, having concluded that the information requested by the Applicants was environmental information, as defined in regulation 2(1) of the EIRs.
15. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
16. The information requested by the Applicants is planning information which concerns the change of use to a structure which is part of the built environment and its possible impact on the state of human health or safety.
17. The Commissioner is satisfied that the information requested by the Applicants fall within the definition of paragraphs (a) and (f) of the definition of environmental information contained in regulation 2(1) of the EIRs.
18. The Applicants have not disputed the Authority's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

The Authority's handling of the request and change of position

19. During the investigation, the Authority withdrew its reliance on regulations 10(5)(d) and 10(5)(e) of the EIRs and released some information which was previously withheld under these exceptions. As the Authority withheld information which it later disclosed, the Commissioner must find that it breached regulation 5(1) of the EIRs.
20. During the investigation, the Authority also notified the Commissioner that it was withholding some information under regulation 11(2) of the EIRs.
21. Regulation 13 of the EIRs specifies the actions that a Scottish public authority must take when refusing to provide information in response to a request.

Regulation 13(b) provides that an authority must specify the reasons for refusing to provide information, and that it should specify any exceptions it is relying on to withhold the information.

22. As noted above, during the investigation the Authority confirmed to the Commissioner that it was withholding some personal data under regulation 11(2) of the EIRs. However, the Authority did not notify the Applicants that it was withholding information under regulation 11(2) of the EIRs in either its response or review outcome. In failing to specify all of the exceptions it was relying on to withhold information from the Applicants, the Authority has failed to comply with the requirements of regulation 13(b) of the EIRs.
23. Given the Authority's change in position (as described above) the Commissioner requires the Authority to issue the Applicants with a revised review outcome which sets out the exceptions which are now being relied upon in relation to the remaining withheld information, and which explains why it considers each exception to apply.
24. During the investigation, the Applicants raised concerns that the information which had been disclosed to them (during this investigation) contained references to further information which had not been disclosed (or withheld under an exception). There were references to:
 - (i) Information provided by a whisky expert; and
 - (ii) Information on the dangers of whisky storage.
25. The Commissioner requires the Authority, in its revised review outcome, to either inform the Applicants where the information covered by points (i) and (ii) is located within the information that has already been provided to them (if it has been disclosed), or to otherwise provide further clarification to the Applicants in relation to this information (e.g. state whether the information is held and if it is being withheld under any exception(s)).

Searches

26. in its submissions, the Authority explained that it conducted an email search for information falling within scope of the Applicants' request using the planning application number, key words and key names to find relevant information.
27. The Commissioner reviewed the information identified by the Authority's searches. He identified one document referenced in the withheld information (in an email of 10 June 2024 at 10.29) as having been sent on 4 December 2023, but this was not located by the Authority's initial searches and it had not been provided to the Applicants (nor had it been provided to the Commissioner, as part of the withheld information). The Authority has since provided the Commissioner and the Applicants with a copy of this document.
28. It is clear that the Authority failed to take adequate steps to identify, locate and disclose information which fell within the scope of the Applicants' request (because it located and disclosed further information during the investigation). Given this, the Commissioner must find that the Authority failed to comply with regulation 5(1) of the EIRs, which requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.

29. As the above document was not initially located by the Authority (and given its content, the Commissioner considers it to be relatively significant in relation to the Authority's handling of the application) the Commissioner is not satisfied that the searches carried out by the Authority have been sufficient to locate all relevant information falling within the scope of the request.
30. As part of its revised review outcome, required by paragraph 23 above, the Authority must carry out further searches for any further information falling within scope of the request and, if such information is located, it must either provide it to the Applicants or notify them that it is being withheld under an exception.
31. The Commissioner strongly suggests that the Authority keeps detailed records of the terms searched for and the searches carried out (copies of emails, screenshots, evidence of who carried out the searches, etc.) as recommended by paragraph 6.2.3 of the [Section 60 Code](#)¹, in case a further appeal is made to his office.
32. In its revised review outcome, the Commissioner also requires the Authority to consider each piece of withheld information individually in terms of potential redactions which would allow some further information to be released (rather than blanket application of the exception at regulation 10(4)(e) (Internal communications) of the EIRs across the withheld information). He would remind the Authority that regulation 10(2) of the EIRs, requires authorities to interpret the exceptions in a restrictive way and to apply a presumption in favour of disclosure.

Timescales

33. In their application to the Commissioner, the Applicants stated that they were dissatisfied with the date that the Authority stated it had received the request. They commented that the original request was made on 18 June 2024 and not 23 July 2024 and that the delay (in part due to the fee calculation) was prejudicial to them.
34. The Authority submitted that it had treated the request as received on the date that the Applicants narrowed their request to information held within the past year, rather than all information which had been the subject of the previous request.
35. The Commissioner notes that the Authority responded to the request of 18 June 2024, by issuing a fees notice and advising the Applicants that if they wanted to try to lower the cost, they could consider refining their request. It provided generic examples of the refinements which could be made. On 23 July 2024, the Applicants submitted a new, narrowed request. The Commissioner considers that the Authority was therefore correct to treat this as the date upon which it received the request.
36. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
37. It is a matter of fact that the Authority did not provide a response to the Applicant's request for information within 20 working days, so the Commissioner finds that it failed to comply with regulation 5(2)(a) of the EIRs.

¹ <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/foi-section-60-code-practice-pdf/foi-section-60-code-practice-pdf/govscot%3Adocument/FOI%2B-%2Bsection%2B60%2Bcode%2Bof%2Bpractice.pdf>

The Commissioner has recorded this failure in his case management system in line with his Interventions Procedures, the purpose of which is to promote good FOI practice across Scottish public authorities. This may be taken into account in any future enforcement action the Commissioner considers necessary to take in relation to the Authority.

Regulation 8 of the EIRs – charging

38. The Authority issued a fees notice in terms of regulation 8 of the EIRs. This allows a Scottish public authority to charge a fee for making environmental information available under regulation 5(1) (regulation 8(1)). By virtue of regulations 8(4) and (6), the authority may require the payment of the fee in advance and is not required to make the information available unless the fee is paid.
39. The Authority issued a fees notice of £114.75 in relation to the new, narrower request on 12 August 2024, but a refund of £104.33 was subsequently issued.
40. In their requirement for review on 8 September 2024, the Applicants expressed dissatisfaction that the calculation of the fee to access the environmental information varied significantly from the initial costs cited and they sought an explanation.
41. In their application to the Commissioner, the Applicants stated that it appeared the Authority did not take account of the exceptions which were applicable to the information, resulting in a fee being levied to access the environmental information forming part of the planning file, and that this appeared to have thwarted the interrogation of the planning file.
42. In its review outcome, the Authority stated that the original fee was based on the calculation that it would take staff 3.5 hours to retrieve, sort, and transfer the information. At that point, the Authority explained, staff were unaware that any exceptions would have to be applied to the information and a fees notice for £114.75 was issued.
43. The Authority stated that, upon payment, staff were asked to gather the relevant information but a number of documents were excepted and the actual cost to the service to supply this information was therefore heavily reduced and not chargeable under EIRs. The Authority then issued an email stating that the Applicants were due a refund of £104.33. This was calculated knowing that each document took circa 18 minutes to find, sort, and transfer and the actual redaction time was calculated at the original rate (although a higher graded individual was the only person available at the time to redact). The Authority considered that this explained the discrepancy between the respective charges.
44. In its submissions to the Commissioner, the Authority confirmed that (following receipt of the request) a fee calculation form was sent to the service dealing with the request and completed. The Authority explained that no fee was levied for information available on the website, or in relation to information which was not held. Information which would be obtained through an email and case file search was listed on the form, based on a search undertaken by one member of staff and an estimated page count calculated using previous experience of the amount of information involved in such requests. This allowed the Authority to estimate redaction time based on personal data redactions only.
45. The Authority stated that after the fee was paid, the service provided all of the information falling within scope of the request, whereupon the Authority concluded other exceptions would have to be applied to that information. The Authority explained that it immediately refunded £104.33 and made the requester aware of this.

46. The Commissioner considers that the Authority has provided a reasonable explanation of the variation in fee. While he has noted the Authority's failure to meet the statutory timescale, above, he does not consider that he has been provided with evidence that the fees element of dealing with the request was the reason for this delay, and he also notes that the Authority is entitled to levy a reasonable charge under regulation 8 of the EIRs.
47. As noted above, the Applicants expressed dissatisfaction with the problems they experienced in attempting to pay the fee which the Authority had applied. However, the Commissioner notes that the overall delay in the Authority's response was greater than the delay experienced by the Applicants when they attempted to make payment using the phone number provided for that purpose.
48. The Commissioner considers that the Applicants' difficulty in making this payment did not make a material difference to the time the Authority took to respond (i.e. he considers that even had the Applicants been able to pay immediately, it seems likely that the response would still have been late). He therefore finds that delay in paying the fee was not the sole causal factor in the Authority's late response.
49. The Commissioner does not consider that the difficulty the Applicants experienced in paying the fee over the phone is a matter upon which he can make a formal finding, as there is no specific provision relating to applicant payments under the EIRs. However, in his view he considers that it is poor customer service for an authority to provide applicants with a phone number to pay a fee, only for those applicants to be unable to do so, and to therefore face a delay in being able to pay (and in obtaining the information). The Commissioner would urge authorities to ensure that any applicant who has been asked to pay a fee is able to do so without undue delay.

Decision

The Commissioner finds that, in respect of the matters specified in the application, the Authority partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicants.

The Commissioner finds that by providing an explanation of why the fee had varied, and in treating the narrowed request as a new request, the Authority complied with the EIRs.

However, by

- failing to respond to the request within the timescales required by regulation 5(2)(a),
- failing to comply with the requirements of regulation 13 in refusing to disclose all of the information, and
- failing to carry out thorough and proportionate searches for the information,

the Authority failed to comply with the EIRs.

The Commissioner requires the Authority to carry out full and thorough searches for any other information which may fall within scope of the Applicants' request, and to issue a revised review outcome to the Applicants in terms of the EIRs, either disclosing any further information identified or explaining why it cannot be provided, by **17 November 2025**.

This revised review outcome must comply with the requirements of paragraphs 23, 25, 30 and 32 above.

Appeal

Should either the Applicants or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Head of Enforcement

1 October 2025

Appendix 1

Planning Application:- APP/2023/1830 | Change of Use of Agricultural Buildings to Class 6 (Storage and Distribution) for Long Term Whisky Storage, Installation of Security Fencing and Formation of Parking Site:- Land At Commieston St Cyrus DD10 0AG

Please furnish [the representative of the Applicants] with all the information not available on the planning portal associated with the above planning application and site.

1. Any pre-application correspondence associated with the site.
2. Representations of objection and support.
3. External Consultation responses.
4. Internal Consultation responses.
5. Correspondence between the case officer and external/internal consultation responses.
6. Correspondence between the case officer and Councillors.
7. Correspondence between the case officer and the agent/applicant.
8. Correspondence between the case officer and team leader/management
9. Any reports undertaken in support of the application.
10. Any records on file (including any EIA Screening Documentation, calculations on the proposals relationship with the Town and Country Planning (Hazardous Substances) (Scotland) Regulations 2015 including the 'addition rule' along with any safety reports submitted/undertaken to enable assessment against National Planning Framework 4, particularly Policy 23: Health and safety (for example the HSE document on Safety Report Assessment Guide: Whisky maturation warehouses).